

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1192

to be argued by
JOHN S. SIFFERT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1595

UNITED STATES OF AMERICA,

Appellee,

—v.—

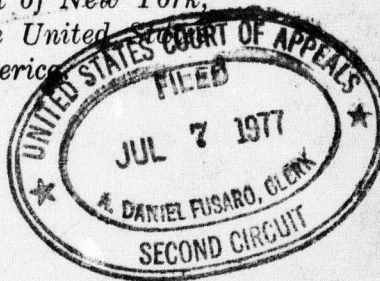
JOSE ROSA, JOSE VEGA, and
RAFAEL RODRIGUEZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

JOHN S. SIFFERT,
T. BARRY KINGHAM,
*Assistant United States Attorneys,
Of Counsel.*



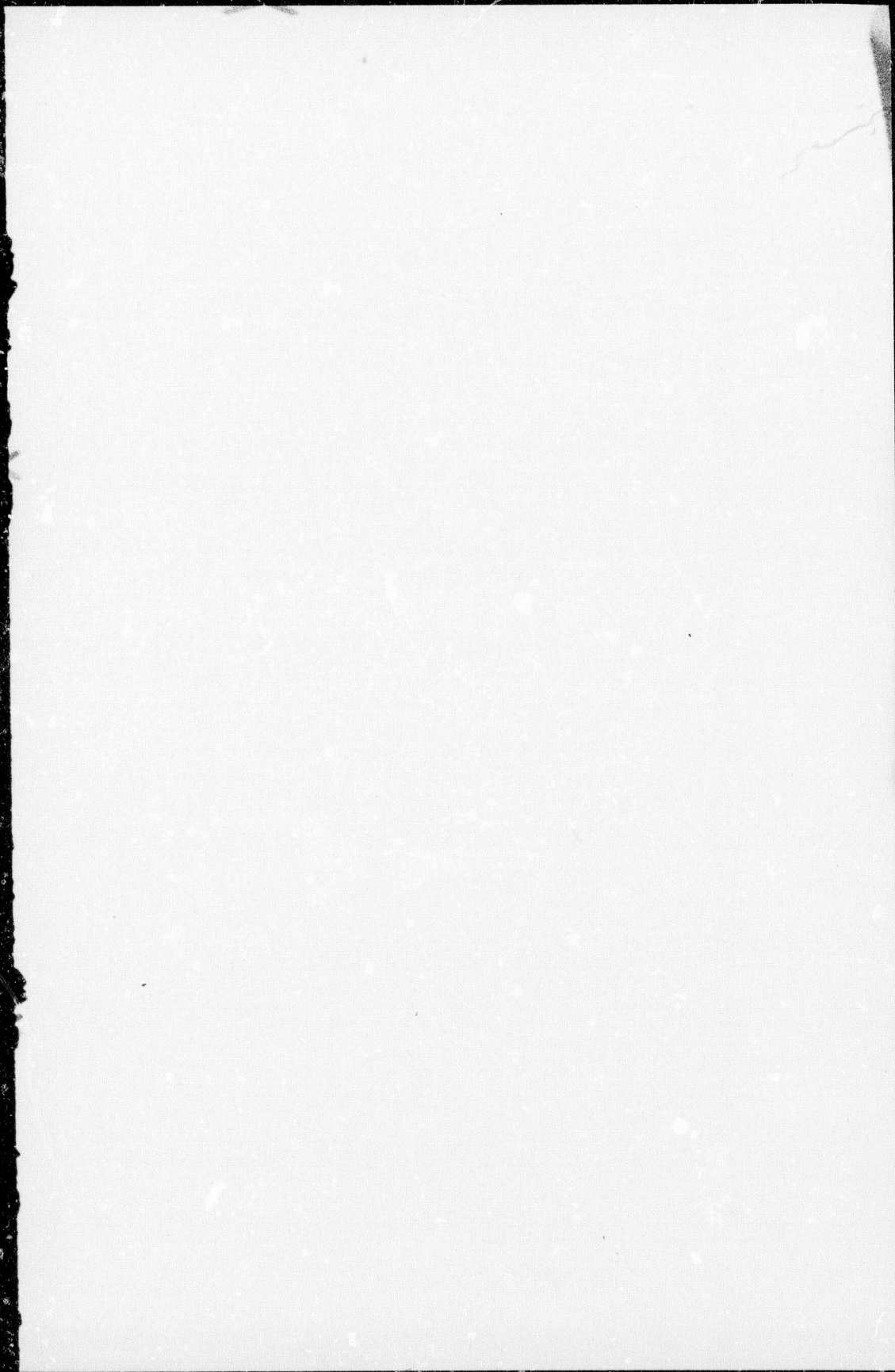


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Appellee,

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JOSE ROSA, JOSE VEGA, and RAFAEL RODRIGUEZ,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jose Rosa, Jose Vega and Rafael Rodriguez appeal from judgments of conviction entered on March 3, 1977 and April 21, 1977 in the United States District Court for the Southern District of New York, following a trial before the Honorable William C. Conner, United States District Judge, without a jury.

Indictment 76 Cr. 655, filed on July 15, 1976, charged Rosa, Vega and Rodriguez in Count One with conspiracy to violate the narcotics laws in violation of Title 21, United States Code, Section 846 and in Counts Two and Three with substantive counts of possession with intent to distribute and distribution of heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A), and Title 18, United States Code, Section 2.

On September 30, 1976, a one-day hearing was held on the defendants' motions to suppress the physical evidence seized from and statements made by the defendants at the time of their arrests on March 31, 1976. On November 10, 1976 Judge Conner denied the defendants' motions in all respects. On January 5, 1977 defendants Rosa and Rodriguez consented to the severance of Count Two from the remaining counts, waived a jury trial and agreed to proceed to trial before the court on Count Two on the basis of a supplemented record of the suppression hearing. The defendants further waived findings of fact and conclusions of law. On January 10, 1977, defendant Vega agreed to the identical procedure.

On January 13, 1977, all three defendants were found guilty of Count Two.

On March 3, 1977, Judge Conner sentenced Rosa to a term of imprisonment of three years plus a special parole term of three years upon his release from imprisonment. With respect to Rodriguez, the District Court suspended imposition of sentence and placed the defendant on probation for three years on the special condition that he participate in a drug treatment program and continue schooling. On April 21, 1977, Judge Conner sentenced Vega * to three years imprisonment plus a special parole term of three years upon his release from imprisonment. Counts One and Three were dismissed with the Government's consent at the time of sentence.

* Vega was not sentenced on March 3, 1977 because he was hospitalized with a stab wound obtained in an unrelated incident. (April 21, 1977 Tr. at 13). "Tr. —" refers to a page in the transcript of the suppression hearing. "(date) Tr." refers to a page in the transcript of a subsequent proceeding on the specified date. "Vega Br. —" or "Rosa Br. —" refers to a page in the respective defendant's brief on appeal.

The defendants presently are on bail pending this appeal.

Statement of Facts

A. Government's Case

The Government's case established that Rosa and Vega were partners engaged in the retail distribution of heroin, operating out of a top-floor apartment at 244 East 106th Street, with Rodriguez acting as one of their "runners". The operation accounted for the daily distribution of approximately one-eighth of a kilogram of heroin.

1. Rosa and Vega Receive and Prepare Heroin for Distribution

On March 30, 1976, at approximately 5 P.M., the Government's informant observed the delivery of one-eighth of a kilogram of heroin to Rosa and Vega at 244 East 106th Street in Manhattan. (Tr. 167-68, 183; 1/5/77 Tr. at 6; * 1/10/77 Tr. at 2).^{*} The informant was told that these narcotics would be distributed to runners in the apartment by 11:00 the following morning. (Tr. 173, 181). Later, in the early hours of March 31, 1976 the informant witnessed Rosa receive a second package of heroin at the Rios Pedro Social Club located on 105th Street between Second and Third Avenues. (Tr. 168, 171, 25). This second package was also to be distributed to runners before 11:00 A.M. on March 31. (Tr. 29; 184).

^{*} On January 5 and 10, 1977 defendants Rosa and Vega stipulated to these supplemental facts. At that time it was also stipulated that hearsay objections were waived, so that the agents' testimony as to what the informant told them was admitted for the truth of the matter asserted for the purposes of determining the defendants' guilt or innocence.

The informant, who had been with Rosa and Vega throughout most of March 30 up to the early morning hours of March 31, had seen Vega with a .38 calibre gun and large sums of money in the apartment. (Tr. 30).

2. The Informant Contacts The Drug Enforcement Agency

At approximately 8:00 A.M. on March 31, 1976, the informant telephoned the Drug Enforcement Agency and spoke to Agent Richard Fiano. (Tr. 122; GX 3501; A-43). The informant told Agent Fiano on the telephone that Rosa and Vega had received from an unidentified male an eighth of a kilogram of heroin that would be distributed before 11:00 A.M. at 244 East 106th Street. Agent Fiano instructed the informant to come to the DEA office. The controlling agent for the informant, Agent Garcia, met the informant at approximately 9:30 A.M., together with Agent Robert Joura. (Tr. 69; 26). The informant related that in the early morning of March 31, he had seen Rosa receive an eighth of a kilogram of heroin at the Rios Piedro Social Club; that Rosa had told him that he and Vega would cut, package and distribute the heroin to runners for sale at about 11:00 A.M. or at least before mid-day; that Rosa had said he would keep the heroin at 244 East 106th Street; that the informant had seen a gun and large sums of money and that one person was in the back room sleeping with a gun under the pillow. (Tr. 26-30; 153; 156; Tr. 170-71; GX 3501).

3. The Informant's Reliability

The confidential informant had been working with the DEA for approximately six months prior to the arrests in this case. (Tr. 78). The informant himself had been

arrested by Agent Garcia in September, 1975 and later identified his own source of supply. (Tr. 21). Subsequently, the informant's supplier was arrested and prosecution was pending at the time of the hearing below. (Tr. 21, 72). The informant also had given the DEA information about the identities of targets of a major heroin investigation ongoing in March, 1976, although no purchases took place until after the arrests of the defendants in this case. (Tr. 21). The informant had also supplied information to the New York Police Department about a sawed-off shotgun that was corroborated prior to March 31, 1976. (Tr. 23; 77). He had also cooperated with the FBI regarding a terrorist organization. (Tr. 24, 78). The general information that the informant supplied the DEA about the Rios Pedro Social Club and narcotics dealing in the area of East 106th Street also comported generally with Agent Garcia's knowledge of that area.

4. The DEA Plan

After receiving the information about the imminent distribution of heroin from its reliable informant, Acting Group Supervisor Michael Levine mapped a plan of operations. The informant first drew a diagram of the apartment where the heroin was stashed, depicting a "railroad flat" including a kitchen, a bedroom and the living room where the man with the gun was sleeping. Agent Levine had the informant return to the apartment equipped with an electronic "beeper" device that would be activated if the informant saw the heroin was still there. A "fail-safe" back-up hand signal was arranged in the event of a malfunction. Agents Levine and Joura disguised themselves as priests and other agents, including Agent Garcia, were assigned surveillance of the apartment. (Tr. 129-30).

The Agents left DEA headquarters between 10:30 and 10:40 and drove to 244 East 106th Street. (Tr. 33; 97; 130-31). En route to the location, Agent Garcia instructed the informant to call Rosa and tell him that he was on his way. When the informant called, Rosa told him that Vega was still asleep but to still come up. (Tr. 32). Alone and on foot, the informant entered the apartment at approximately 11:15 A.M. and the agents waited outside. (Tr. 97).

5. The Informant's Signal

After one hour or more, between noon and 12:30 P.M., Agent Garcia saw the informant give the "fail-safe" signal from Rosa's living room. (Tr. 34; 86; 131). The agents immediately entered the building, with Agent Levine at the lead. As quietly as they could, Agents Levine, Joura and Garcia climbed to the top floor. (Tr. 131). When the agents arrived at the top of the stairs, the door to Rosa's apartment was slightly ajar. Agent Levine went right to the door, where he could see a kitchen table with "glassine-type bags and . . . metallic paper" on the table. (Tr. 131-33). Agent Garcia confirmed that there was narcotics paraphernalia on the kitchen table as they entered, but admitted to inadvertently labelling them later as having been found in the cardboard box in the bedroom dresser. (Tr. 36; 50-51; GX 2B, 2C). Agent Joura recalled seeing a person at the door repairing it. (Tr. 86). Once at the door, Agent Levine saw three people in the kitchen as he entered.

With shields in one hand and revolvers in the other, the agents walked through the open door of Rosa's apartment into the kitchen. Seated at the table with the glassine envelopes and tinfoil was Rodriguez; standing were Rosa, Rosa's wife, one male who was released after twenty minutes and another individual who was taken to head-

quarters and later released. (Tr. 134; 36; 39). While Agents Garcia and Levine guarded the people discovered in the kitchen, Agent Joura went to the back room where Vega was asleep on the couch. Putting his gun to Vega's head with one hand, Joura grabbed Vega's clasped hands with his other hand. As Vega awoke, Joura said "police" and Vega nodded without a fight. As Vega rose from the sofa, the throw pillow on which he was lying fell to the floor, exposing a .38 calibre police special revolver. (Tr. 86-87). Agent Joura picked up the gun and took Vega into the kitchen to join his associates who were already under arrest.

6. The Search Incident To The Arrests And Rosa's Consent To Search Further

Agents Williams and Fiano appeared in the apartment to aid their brother agents. Agent Fiano patted down Rodriguez, felt an object in his left pocket and withdrew a small pouch bearing the words "Gold Rush." Inside, Agent Fiano discovered twenty-seven bags of heroin, diluted for street use. (GX 4, 4A, 4B; Tr. 46). At this point Rosa declared "Everything ~~here~~ is mine. It's all mine. Whatever you find here is mine. You got me good." (Tr. 137; 46). Agent Garcia promptly pulled out a DEA card and in Spanish advised the Spanish-speaking defendants of their rights. (Tr. 137; 47; GX 4C).

Agent Levine then asked Rosa if there was more contraband. Rosa replied in effect: "You have to let everybody else go and just don't tear the house up and I will show you what I got." Rosa then went to a dresser and pointed out a box containing glassine bags, silver foil and other paraphernalia. (Tr. 138; 48, 89; GX 2).

Agent Garcia asked to look around and Rosa said "go ahead as long as you don't break the place up." Rosa

went into the living room and showed Agents Williams and Joura a paper bag behind the sofa containing \$4,500. (Tr. 89; 52-54; GX 3). Agents Joura and Williams then followed Rosa who pointed to a stereo unit. The agents removed a metal box containing strainers, spoons, glassine envelopes, a small scale, a toothbrush and a small blender. (Tr. 89; 54; GX 5).

The agents also seized various papers which were in plain view atop the bedroom dresser as well as other papers among the defendants' personal effects found during the course of ordinary processing at DEA Headquarters. (Tr. 59-60).

The defendants did not testify and they called no witnesses.

ARGUMENT

POINT I

The Warrantless Arrests And Seizures Of Evidence Were Entirely Proper.

Without directly attacking the existence of probable cause for the arrest or search, the defendants assert that the agents' failure to procure arrest and search warrants required suppression of the narcotics and paraphernalia seized from Rosa's apartment, notwithstanding the District Court's correct factual finding that: "the delay entailed in obtaining a warrant would in all likelihood have prevented them from 'arresting' not only defendants alone, but rather the 'destruction of the evidence' as well. 'Destruction' in the present case would have been the most damaging nature, that is, commercial distribution". (A-26, citation omitted).

A. The Warrantless Arrests Were Entirely Proper

The procedure followed by the agents in this case was expressly approved by this Court in *United States v. Artieri*, 491 F.2d 440 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974). There, an undercover informant told arresting officers that Artieri and one Gonzales were going to divide a quantity of heroin at Gonzales' residence. The informant accompanied Artieri to the residence and upon his entry the informant gave a pre-arranged signal. The police entered, found Artieri upstairs and the heroin was observed on the table. The Court held:

"The purpose of the entry was to arrest those whom the agents had probable cause to believe were in illegal possession of narcotics." *Id.*, 491 F.2d at 443.

In addition, the fact that the DEA agents awaited a signal without first obtaining a warrant is of no moment. As this Court held in *United States v. Morell*, 524 F.2d 550, 556 (2d Cir. 1975):

"Before making the arrests [of the defendants] the agents were entitled to wait until such time as events had proceeded to the point where the agents could be reasonably certain that the available evidence would ultimately support a conviction. This seems to us to have been simply a matter of good police practice."

A warrant obviously could not have been obtained in these circumstances, since the informant had told the agents that the heroin in the apartment was prepared for prompt distribution. Indeed, they were told at 9:30 A.M. that the distribution would occur within an hour and a half. Defendants' bald claim that DEA had suf-

ficient information as of 8:00 A.M. upon which to seek a warrant is unfounded. At 8:00 A.M. the informant did call the DEA to report Rosa's and Vega's distribution scheme. However, the conversation was by phone with Agent Fiano, who was not the informant's handling agent. Agent Fiano's requirement that the informant personally appear at DEA headquarters, and that the Acting Group Supervisor first be consulted before any action was taken can hardly be complained of as dilatory. Indeed, it is unlikely that a warrant could have or should have been obtained solely on the basis of the informant's telephone call to Agent Fiano.* It was only *after* the informant spoke face-to-face with the agents that the agents had information which could be described as "sufficient to warrant a prudent man in believing that the [defendants] committed . . . an offense". *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976), quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States v. Watson*, 423 U.S. 411, 417 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

Thus it was 10:00 or 10.30 A.M. before the agents knew they could act. By that hour, the agents also believed they had to act by eleven o'clock. This case is therefore entirely unlike *United States v. Wilcox*, 357 F. Supp. 514 (E.D. Pa. 1973), relied upon by defendants, where the agents had probable cause to obtain a warrant but still waited for an hour and one-half until it became too late to get a warrant. In contrast, the DEA here simply followed good police practice by requiring the informer to personally appear. Only then did they verify the telephone number and address of the apartment where

* Had the agents obtained a warrant solely on the basis of the 8:00 A.M. phone call, the defendants undoubtedly would have challenged the sufficiency of the affidavit underlying the warrant.

the heroin was stored (Tr. 30); only then did they get a layout of the apartment; and only then did they learn of the existence and whereabouts of weapons. (Tr. 30; 153).^{*} Moreover, the *Wilcox* case involved the need to obtain a search warrant, not an arrest warrant which is the initial issue here. See 21 U.S.C. § 878; *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411, 414-24 (1976); *United States v. Brown*, 540 F.2d 1048, 1055 (10th Cir. 1976); *United States v. Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965).

Plainly, the District Court was correct in holding that the DEA acted properly in the face of the exigency that the heroin would be distributed on the streets in a short time. Indeed, even without the informant's tip of the expected imminent distribution, the agents would have been justified in proceeding without a warrant, given the judicially recognized fact that "the contraband believed to be in [defendant's] apartment—narcotics—is by its nature readily destructible". *Rodriguez v. Butler*, 536 F.2d 982, 986 (2d Cir. 1976).

The defendants' assertion that the police had the situation entirely under their control and therefore could await the arrival of a warrant, ignores the fact that upon the information available to them, the agents saw the need to disguise themselves as priests and to go to the top of the stairs on tiptoes. (Tr. 131). It is apparent from these precautions that the agents quite properly believed that, through lookouts or other sources, normal police behavior would have been communicated to Rosa, and

^{*} The defendants invite this Court to consider *de novo* which agent best estimated the speed with which a warrant could have been obtained. This Court should not accept defendants' invitation absent any basis for holding that the District Court was clearly erroneous in finding that it would have taken approximately four hours.

would have resulted in the loss of the heroin. Finally, defendants' argument that exigencies did not require prompt action because the DEA arrived at the scene shortly *after* eleven o'clock is irrelevant, since the DEA took the additional precautions of having the informant telephone Rosa, who said to come over; and further awaited the informant's signal confirming that the heroin was still at the apartment. Indeed, the agents' action in awaiting this final corroboration of Rosa's presence with heroin in the apartment solidifies the reasonableness of the entry and arrests.

B. The Post Arrest Seizures Were Properly Conducted Incident To The Arrests, In Plain View, And By Consent

The defendants, recognizing the weakness of their initial position, resort to the alternative argument that even if the arrests were lawful, the agents should have sought a search warrant for Rosa's apartment after the defendant's arrests. This claim is also without merit.

First, this argument does not affect a substantial portion of the seized items, including the papers on the bedroom dressers and the narcotics on the kitchen table. (GX 2B, 2C, 6-16; Tr. 36, 50-61). The District Court properly held that these seizures fall "squarely within the 'plain view' exception to the warrantless search rule". *Harris v. United States*, 390 U.S. 234, 236 (1968). Similarly, the seizure of Vega's gun was permissible under the plain view doctrine. Judge Conner ruled that Agent Joura was acting with "reasonable caution" in proceeding through the apartment to insure against the reported presence of weapons. See *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3249 (October 4, 1976) ("Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their prem-

ises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other equipment.").

By the same token, the defendants' alternative argument does not affect the frisk or search incident to the arrest of Rodriguez that resulted in the discovery of the "Gold Rush" pouch containing 27 packets of distributable heroin. As Judge Conner found, the rule of *Chimel v. California*, 395 U.S. 752, 762-63 (1969) applies:

"When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or affect his escape . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."

See also *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Vigo*, 487 F.2d 295 (2d Cir. 1973); *United States v. Chiu*, 522 F.2d 330, 332 (2d Cir. 1975).

The only items as to which the defendants' search warrant argument applies are the narcotics, paraphernalia and money to which Rosa personally directed the agents' attention after his arrest. Judge Conner properly reasoned that these items should not be suppressed because Rosa voluntarily consented to the search. Mindful of the "clear and positive evidence" that the Government must present in order to establish consent in the "totality of the circumstances", the court weighed the "discrepancies" in testimony and scrutinized the "witnesses' demeanor, candor, experience and intelligence". Judge Conner concluded "that Rosa's consent to the search of his apartment was offered freely, knowingly, and without equivocation". (A-2-3). The court found that Rosa had not

been threatened or tricked; that the agents had only requested and inquired of Rosa whether they could search; and that Rosa had been advised of his rights in his native language. Contrary to the defendants' interpretation, the district court found that Rosa's warning not to disturb his household effects was demonstrative of Rosa's "wit and pluck"—and not of any DEA coercion. The District Court also appreciated Rosa's spontaneous utterance that "it's all mine" and his eagerness to actually show the agents where the narcotics was stashed in determining the voluntariness of the consent. See *United States v. Smith*, 308 F.2d 657, 663-64 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963). Indeed, it appeared that Rosa wanted to be the hero and take full blame for all his companions.

Finally, Judge Conner's factual holding of voluntary consent is abundantly supported in legal precedent. *United States v. Watson*, 423 U.S. 411, 424 (1976); *United States v. Candella*, 469 F.2d 173, 175 (2d Cir. 1972); *Schneekloth v. Bustamonte*, 412 U.S. 218, 226, 248-49 (1973); *United States v. Wiener*, *supra*, 534 F.2d at 17; *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Faruolo*, 506 F.2d 490, 493 (2d Cir. 1974); *United States v. Rothberg*, 460 F.2d 223, 224-25 (2d Cir. 1972); *United States v. Sullivan*, 321 F. Supp. 597 (S.D.N.Y. 1971).

The motion to suppress was properly denied.

POINT II

The Government Was Not Required To Disclose The Informant's Identity.

The defendants claim that the informant's identity, if not his testimony, should have been produced at the suppression hearing. This claim, formulated in part on

misstatements of the record and assumptions contracted by the District Court's findings, is without merit.

The arrests here were made upon detailed information supplied by a reliable informant, whose information was independently confirmed by the DEA agents prior to entry into Rosa's apartment. Under these circumstances, non-disclosure of the informant's identity was not error, "because on-the-scene corroboration of the informer was a 'sufficient voucher against fabrication' ". *United States v. Gonzalez*, Dkt. No. 76-1523, slip op. 3351, 3360 (2d Cir., May 6, 1977), citing *United States v. Carneglia*, 468 F.2d 1084, 1088-89 (2d Cir. 1971), *cert. denied, sub nom. Inzerillo v. United States*, 410 U.S. 945 (1973), and *United States v. Comissiong*, 429 F.2d 834 (2d Cir. 1970).

The defendants' initial argument appears to be that since they knew who the informant was, the Government might just as well have called him as a witness. However, it appears that either the defendants did *not* know his identity or, if they did, they did not really want him to testify, because *they* did not call him as a witness. Moreover, as Agent Levine testified with great clarity, in addition to Rosa, his wife and Rodriguez, there were *two* other individuals in the kitchen (Vega was in the bedroom) who were released, not just one. (Tr. 134).

Certainly the Government's privilege to conceal the informant's identity was not extinguished by the defendants' speculations. *United States v. Turbide*, Dkt. No. 76-1533, slip op. 4341, 4354 (2d Cir., June 22, 1977). Indeed, there is no showing that defendants even attempted to locate the informant with the limited knowledge of his identity that they claimed to have had. (*Id.* at 4354 n.6.)

Without directly claiming that the Government did not establish probable cause for the arrests, the defendants nonetheless argue that the informant's testimony was

necessary before the District Court could determine if the Government had met its burden of proof.* The argument is premised in part on assertions that Agent Garcia's testimony was incredible (Rosa Br. at 25-26; Vega Br. at 25-26); that Agent Levine's testimony concerning narcotics on the kitchen table was untruthful (Rosa Br. at 25); and that the informant's reliability was untested. (Rosa Br. at 25).

The District Court was well aware of the defendants' attack on Agent Garcia's credibility and therefore permitted the defense great leeway on cross-examination. (Tr. 172). With an expansive record before him, and an opportunity to observe the agents' demeanor on the stand, Judge Conner noted in his opinion that the accounts of those who testified for the Government—the sole witnesses at the hearing—were neither wholly consistent, *inter se*, nor in all respects uniform with prior statements reflected in the exhibits before the Court. The discrepancies so noted—minor for the most, if not the whole, part—have been resolved by assessment of the witnesses' demeanor, candor, experience, and intelligence". (A. 16-17). The District Court found, as truthful, the very testimony of Agent Garcia now attacked by defendants: that the informant told Agent Garcia about the delivery of one-eighth of a kilogram of heroin to Rosa and Vega at the Rios Pedro Social Club; that it would be distributed at about 11:00 A.M.; and that the informant had seen money

* The defendants' claim that the Government made an inadequate showing of the risk to the informant's life if he testified (Rosa Br. at 23; Vega Br. at 287), comes with peculiar ill-grace. It was after all the defendants themselves who objected to the Government developing this proof (Tr. at 60-62). Moreover, the Court concluded that the record was sufficient to establish risk to his safety. It is especially surprising for Vega now to argue that the defendants "were not demonstrably dangerous". At the time of Vega's arrest he was in possession of a .38 calibre gun loaded with bullets.

and guns at Rosa's apartment. Although Agent Garcia's testimony alone is ample support for the District Court's finding, there is corroboration of his account in the record. Agent Levine on cross-examination testified that he personally interviewed the informer who gave him virtually the same facts. (Tr. 150-53). Upon the basis of this record, this Court cannot conclude that the District Court's findings were clearly erroneous. *United States v. Cirillo*, Dkt. No. 77-1045, slip op. 3247, 3249 (2d Cir., April 28, 1977).

Similarly, the defendants are incorrect in suggesting that Agent Levine lied about seeing the narcotics paraphernalia on the kitchen table prior to entering Rosa's apartment. (Rosa Br. at 25). The DEA reports in which Agent Garcia omitted reference to these items, were all before the District Court and were used for cross-examination of the agents. (Tr. 160-63). Nonetheless Agent Levine twice stated on direct examination that he had seen the glassine envelopes and tin foil prior to entering (Tr. 132, 134), and he confirmed it again on cross-examination. (Tr. 141). Agent Garcia corroborated Agent Levine, testifying that immediately upon entering the apartment he, too, saw the glassine envelopes and tin foil on the kitchen table. (Tr. 38-39). Thus, Judge Conner explicitly considered the asserted inconsistencies between the testimony and the prior reports, and expressly resolved those discrepancies "by assessment of the witnesses' demeanor, candor, experience and intelligence". This Court should not find that Judge Conner was clearly erroneous. *United States v. Cirillo, supra*.

The defendants' assertion that the informant's reliability was untested also misstates the record. As Judge Conner found, the informant had supplied reliable, corroborated information in no fewer than four other cases. He had identified the source of supply in his own arrest. (Tr. 21). He had identified other heroin dealers in an

Eastern District case. (Tr. 21). He had supplied the New York City Police Department with information concerning a shotgun. (Tr. 23, 177). He also had advised the FBI of information concerning a terrorist organization. (Tr. 24, 78). In this very case, the informant previously had identified the social club where narcotics transactions occurred and had supplied the agents with a telephone number of Rosa's apartment where narcotics would be found, both of which had been confirmed prior to the arrests. Accordingly, the District Court properly found that the informant was reliable. *Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

In recent cases, this Court has held that an informant's past reliability is not a pre-requisite to a finding of probable cause where, as here, the agents can independently corroborate aspects of the informant's present information. *United States v. Gonzalez*, Dkt. No. 76-1523, slip op. 3351, 3358 (2d Cir., May 6, 1977); *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977); *United States v. Harris*, 403 U.S. 573 (1971); *United States v. Rodriguez*, 532 F.2d 834 (2d Cir. 1976); *Mapp v. Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976); *United States v. Canestri*, 518 F.2d 269, 272 (2d Cir. 1975); see also, *United States v. McCoy*, 478 F.2d 176, 179 (10th Cir.), *cert. denied*, 414 U.S. 828 (1973). In this case, the agents verified the existence of the social club and the location of the apartment at which the telephone was listed. (Tr. 20-30). Indeed, Agent Garcia testified that the informant's reports about narcotics traffic in the East 106th Street area comported with his own general knowledge. In addition, prior to entry into the apartment, Agent Levine saw narcotics paraphernalia on the kitchen table. (Tr. 134). That corroboration certainly is enough to establish the informant's reliability. *United States v. Rollins*, *supra*, 522 F.2d at 165; *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972).

The agents' independent corroboration of the informant's information that led to the arrests also support the District Court's holding that the Government could maintain the confidentiality of the informant. *United States v. Gonzalez, supra*; *United States v. Comissiong, supra*; *United States v. Canestri, supra*; *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976).

Nondisclosure is particularly appropriate here, where defendants have merely demonstrated that they were prepared to cross-examine the informant about having told the DEA about only one narcotics transaction prior to the arrests and then having told them about the second transaction after the arrests. There is absolutely no suggestion in the record that the informant participated in the distribution of narcotics; nor that he helped set up the crime in question; nor that he had any evidence helpful to the defense either as to the issue of probable cause or to the issue of defendants' guilt or innocence. At most, the informant was a witness who had evidence which incriminated the defendants and bolstered the agents' probable cause.

In these circumstances the District Court did not abuse its discretion in refusing to order disclosure of the informant's identity. See *United States v. Turbide, supra*, slip op. at 4355-56; and the District Court properly found the existence of probable cause without requiring the informant to testify. *United States v. Gonzalez, supra*, slip op. at 3360.

POINT III

Title 21, United States Code, Section 812, Does Not Require The Attorney General To Reevaluate The Controlled Substances Schedules. There Has In Any Event Been Updating^{And} Republication In Compliance With The Act.

The defendants claim that the indictment should be dismissed for failure to charge an offense on the sole ground that the Attorney General has not updated * the schedules of controlled substances pursuant to Title 21, United States Code, Section 812. Since there is no support for defendants' interpretation of the "updating and republication" requirement of Section 812 in the statute, its legislative history or the case law, the claim is without merit. In any event, the Attorney General has republished the schedules of controlled substances in compliance with the Act.

Title 21, United States Code, Section 812(a) provides:

"There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules *shall initially consist of* substances listed in this section. The schedules *established by this section* shall be updated and republished on a semi-annual basis during the two

* Defendants did not raise this precise issue below, having relied solely upon the "republication" argument which they now concede is without merit. A careful review of defendants' papers below demonstrates that the "updating" argument was not made. Nor did the District Court perceive the motion to have raised anything except the "republication" issue. (1/5/77 Tr. at 7-8). Accordingly, this Court should treat this issue as waived. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). However, because defendants now raise this argument on appeal, this point addresses the issue on its merits.

year period beginning one year after the date of enactment of this subchapter *and shall be updated and re-published on an annual basis thereafter.*" (Emphasis added.)

Section 811(a) provides in part:

"The Attorney General shall apply the provisions of this subchapter *to the controlled substances listed in the schedules established by Section 812 of this title and to any other drug or any substance added to such schedules under this subchapter.*" (Emphasis added.)

The statutory scheme therefore makes plain that it is a crime to distribute or possess with intent to distribute any narcotic substance, such as heroin, which *was listed by Congress* and any other drug which is added pursuant to the procedures set forth by the statute. The terms of the statute plainly mean that those substances listed by Congress in Schedule I are to remain controlled substances unless and until they are explicitly removed pursuant to the procedures prescribed by Section 811. *United States v. Monroe*, 408 F. Supp. 270, 274 (N.D. Cal. 1976), *aff'd*, 552 F.2d 860 (9th Cir. 1977).

It is frivolous to contend that the Attorney General could invalidate the entire findings of Congress on these life-and-death issues by inadvertance or even intentional disregard for these detailed procedures outlined by Congress in Section 811c(1)-(8) for removal of controlled substances from the schedules. Indeed, adoption of defendants' view would permit the Attorney General to disregard not only Congress' findings and Congress' procedures but also to overrule by indirection the findings of the Secretary of Health, Education and Welfare as to the scientific and medical effects of a particular drug, a power expressly withheld from the Attorney General in Section 811(b). *United States v. Andrews*, 408 F. Supp. 1007, 1010-11 (N.D. Cal. 1976). Moreover, as the District

Court in *Monroe* reasoned, had the Congress intended the Attorney General to annually reevaluate each controlled substance included by Congress in Section 812, it would not have expressly provided in Section 811(a) for the initiation of proceedings "on the petition of any interested party." (408 F. Supp. at 274).

The legislative history of the Act supports the Government's position. H.R. Rep. No. 91-1444, 3 U.S. Code. Cong. Admin. News 4589 stated:

"Part B of the bill (sections 201 and 202) lists the drugs *initially subject to control* under the legislation, and *establishes a procedure for future determinations* as to drugs to be subject to the controls of the bill." (Emphasis added.)

Nowhere in the legislative history is there support for the proposition that updating and republication in the Federal Register is a necessary prerequisite. Indeed, throughout the legislative history, there is reference to the lengthy congressional studies and the controversy created by conflicting medical opinions considered in determining which substances initially ought to be listed by Congress.

None of the cases cited by defendants supports their construction of the law.* In fact, the only courts which have reached and discussed the issue raised here have flatly rejected defendants' claims. *United States v. Eddy*, 549 F.2d 108, 111-13 (9th Cir. 1976); *United States v. Monroe, supra*; *United States v. Andrews, supra*. The *Eddy* case, not referred to by defendants, is dispositive of both the updating and republication claims:

* *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975); *United States v. Infelice*, 506 F.2d 1358, 1364-65 (7th Cir.), *cert. denied*, 419 U.S. 1107 (1974); *United States v. Nocar*, 497 F.2d 719 (7th Cir.), *cert. denied*, 419 U.S. 1038 (1974); and *United States v. Grummel*, 542 F.2d 789 (9th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3464 (Jan. 10, 1977), simply did not reach the issue.

"Section 812 delegates no authority to change existing laws or regulations that is relevant here. When read in conjunction with § 811, the updating and republication requirement of § 812(a) expresses a desire on the part of Congress to maintain an accessible, up-to-date set of schedules. The requirement is not intended to provide notice of acts which would be criminal, as defendants contend. That function is performed by the publications of § 811(a). Nor is it intended to require that the Attorney General resort to the procedures of § 811 to reevaluate the status of each controlled substance every year. Section 811(a) provides for reevaluation at any time upon petition of the Attorney General, the Secretary of Health, Education and Welfare, or any interested party. Section 812 requires simply that the changes made in the schedules and published in the Federal Register over the course of the year be compiled and incorporated into the existing schedules. The legislative history of § 812 makes no mention of the Federal Register and justifies no inference that republication must occur therein. We cannot say that annual undating and republication in the Code of Federal Regulations does not satisfy the mandate of § 812(a)." (*Id.*, 549 F.2d at 113).

In any event, the appearance of the schedules of controlled substances in 21 C.F.R. § 1308.11, which includes heroin, 21 C.F.R. § 1308.11(c)(11), satisfies the requirements of 21 U.S.C. § 812.* *United States v. Eddy, supra*; *United States v. Andrew, supra*, 408 F. Supp. at 1009 n. 3.

* 21 C.F.R. 1308.01 provides:

"Schedules of controlled substance established by section 202 of the Act (21 U.S.C. § 812), as they are changed, updated and republished from time to time, are set forth in this part."

CONCLUSION

Wherefore the judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JOHN S. SIFFERT,
T. BARRY KINGHAM,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

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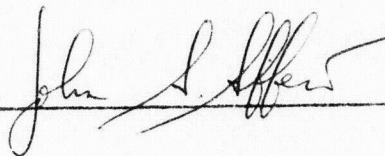
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140 Broadway
New York City NY 10005

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401 Broadway
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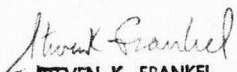
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